

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2013-432890-001 DT

01/27/2014

COMMISSIONER PATRICIA ANN STARR

CLERK OF THE COURT
O. Hernandez
Deputy

STATE OF ARIZONA

JEROME FENTON

v.

FLOYD L MCAULIFF (001)
DOB: 2/10/1954
Booking No.: P989750

MITCHELL WEINSTEIN

COMM. NOTHWEHR
CORRECTIONAL HEALTH SERVICES
COURT FORENSIC SERVICES UNIT
D & C MATERIALS-CSC

RULING - DEFENDANT COMPETENT - A.R.S. Section 13-4510(B) - SUBMISSION

On January 6, 2014, this Court took this matter under advisement. The Court has considered the testimony presented at the evidentiary hearing, the Court's file, Exhibit One, and the argument and *Bishop*¹ statements of counsel.

At issue is whether there is reasonable evidence that Defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he has a rational as well a factual understanding of the proceedings against him. *Dusky v. United States*, 362 U.S. 402 (1960); A.R.S. § 13-4502; Rule 11, Ariz.R.Crim.P. A person may not be tried, convicted, sentenced or punished for a crime "while, as a result of mental illness, defect, or disability, the person is unable to understand the proceedings against him . . . or to assist in his . . . own defense." Rule 11.1, Ariz.R.Crim.P. A defendant may not be found incompetent to stand trial solely because he suffers from a mental illness, defect or disability. *Id.*

Previous Evaluations

¹ *Bishop v. Superior Court*, 150 Ariz. 404, 724 P.2d 23 (1986).
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Defendant has had previous evaluations in other Rule 11 proceedings. In a prescreening report from March of 2000, Dr. Jack Potts found that Defendant was competent. (Potts Report dated March 8, 2000, at 2-3.)

In a report authored in June of 2012, Dr. Laura Pieri opined that Defendant was not competent to stand trial. (Pieri Report dated June 28, 2012, at 10). She could not state whether Defendant could be restored to competency, and recommended neuropsychological testing to clarify his restorability. (*Id.* at 11). After that neuropsychological testing was completed, Dr. Pieri authored another report, in which she opined that Defendant was not competent, due to significant cognitive defects. (Pieri Report dated August 16, 2012, at 10). She further opined that he was not restorable to competency, due to dementia. (*Id.*)

In April of 2013, Dr. Karen Sullivan found Defendant not competent, not restorable. (Sullivan Report dated April 2, 2013, at 1). Dr. Sullivan based her finding primarily on Defendant's dementia, and found little hope of improvement. (*Id.* at 6).

Dr. Virginia Conner conducted a neuropsychological evaluation of Defendant in August of 2012, and authored a Rule 11 examination report dated April 8, 2013. She found Defendant not competent, with no substantial probability that he would be restored to competency. (Conner Report dated April 8, 2013, at 4).

Current Evaluations

In this matter, Dr. Jason Frizzell evaluated Defendant and found him competent. (Frizzell Report dated September 4, 2013, at 1.) Dr. Frizzell believed that Defendant was exaggerating both his cognitive deficits and his psychological symptoms. (*Id.* at 6.) In October of 2013, Dr. Frizzell provided a supplemental report after he reviewed prior Rule 11 evaluations of Drs. Pieri, Conner and Sullivan. His review of those evaluations did not change his opinion. (Frizzell Report of October 16, 2013, at 1-2). Specifically, Dr. Frizzell pointed out what he saw as the problems with the previous evaluations, (*id.* at 1-2), the lack of documentation to support a dementia diagnosis or a prior history of mental illness, as well as his opinion that Defendant was exaggerating his symptoms and deficits. (*Id.* at 2-3).

Dr. Bruce Kushner also evaluated Defendant, and also found him competent. (Kushner Report dated September 9, 2013, at 1). Dr. Kushner found that Defendant had mild impairment of cognitive functioning, but also showed signs of exaggerating his symptoms. (*Id.* at 5). Dr. Kushner later reviewed the prior competency evaluations; his opinion remained unchanged. (Kushner Report dated October 16, 2013).

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Dr. Katrina Buwalda evaluated Defendant in December of 2013, and found that he is not competent, and not restorable. (Buwalda Report dated December 19, 2013, at 1). Dr. Buwalda opined that Defendant has impaired memory, as well as concentration and attention problems. (*Id.* at 9). At the evidentiary hearing, Dr. Buwalda testified that she would diagnose Defendant with Cognitive Disorder, not otherwise specified, and she would recommend further neuropsychological testing.

Conclusion

The experts are in disagreement regarding Defendant's competency. Based on its review of the reports, Correctional Health Services records, testimony, and arguments and statement of counsel, the Court finds the opinions of Dr. Frizzell and Dr. Kushner more persuasive.

The Court finds there is reasonable evidence that Defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and he has a rational as well as factual understanding of the proceedings against him and can assist his lawyer in his defense, should he choose to do so.

THE COURT FINDS that the Defendant is competent and understands the proceedings and is able to assist counsel in Defendant's defense, and is therefore competent pursuant to A.R.S. § 13-4510.

IT IS FURTHER ORDERED transferring this matter to Commissioner Nothwehr for further proceedings.

IT IS FURTHER ORDERED setting Initial Pretrial Conference/Not Guilty Arraignment on 2/4/2014 at 8:15 a.m. before Commissioner Nothwehr.

IT IS FURTHER ORDERED excluding the time from 7/25/2013 through 1/27/2014 pursuant to Rule 8.4 (186 days).

New Last Day: 6/26/2014.

Counsel are directed by the Court to recompute the new last day and advise the Court within three (3) judicial days of notification if the computation is in error.

IT IS FURTHER ORDERED affirming prior custody/release orders.

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IT IS FURTHER ORDERED that the written report(s) of the expert(s) be sealed and maintained in a confidential manner by the Clerk of the Superior Court; said report(s) shall not be disclosed to anyone except by written order of the Court.

SEALED AND FILED: Medical report(s) by the expert(s).
Exhibit Worksheet